



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Motor Carrier Safety Administration**

#### **49 CFR Part 385**

**[Docket No. FMCSA-2019-0081]**

**RIN 2126-AA64**

### **Certification for Conducting Driver or Vehicle Inspections, Safety Audits, or Investigations**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** FMCSA incorporates by reference in its regulations the Commercial Vehicle Safety Alliance's (CVSA) "Operational Policy 4: Inspector Training and Certification," as required by the Fixing America's Surface Transportation Act (FAST Act). The CVSA policy provides the current policy and practices for FMCSA employees, State or local government employees, and contractors to obtain and maintain certification for conducting driver or vehicle inspections. It has been Attachment A to FMCSA's "Certification Policy for Employees Who Perform Inspections, Investigations, and Safety Audits." Consistent with the requirements of the FAST Act, this rule substitutes the most recent version of the CVSA policy, reflecting revisions to the version referenced in the July 8, 2019 notice of proposed rulemaking (NPRM). The revisions include availability of inspector certification extensions under declared emergency situations adopted in response to the COVID-19 National emergency. This rule also replaces an interim final rule (IFR) in place since 2002.

**DATES:** This final rule is effective [Insert date of publication in the FEDERAL REGISTER]. The incorporation by reference of certain publications listed in the

regulations is approved by the Director of the Federal Register as of [Insert date of publication in the FEDERAL REGISTER].

Petitions for Reconsideration of this final rule must be submitted to the FMCSA Administrator no later than [Insert date 30 days after date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul Bomgardner, Chief, Hazardous Materials Division, Office of Enforcement and Compliance, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, (202) 493-0027, paul.bomgardner@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

**SUPPLEMENTARY INFORMATION:**

**I. Rulemaking Documents**

*A. Availability of Rulemaking Documents*

For access to docket FMCSA-2019-0081 to read background documents and comments received, go to <https://www.regulations.gov> at any time, or to Dockets Operations at U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

*B. Privacy Act*

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice DOT/ALL 14 – Federal Docket Management System, which can be reviewed at [www.transportation.gov/privacy](http://www.transportation.gov/privacy).

**II. Executive Summary**

*A. Summary of the Regulatory Action*

Under section 5205 of the FAST Act (note following 49 U.S.C. 31148), the FMCSA Administrator is required to incorporate by reference the certification standards for conducting driver or vehicle inspections<sup>1</sup> issued by CVSA. CVSA's "Operational Policy 4: Inspector Training and Certification" provides the current policy and practices for FMCSA employees, State or local government employees, and contractors to obtain and maintain certification for conducting driver or vehicle inspections. It has been Attachment A to FMCSA's "Certification Policy for Employees Who Perform Inspections, Investigations, and Safety Audits." Consistent with the requirements of the FAST Act and current certification processes, this rule incorporates by reference in its regulations CVSA's policy and substitutes the most recent version of the CVSA policy. This rule reflects revisions to the version referenced in the July 8, 2019 NPRM (84 FR 32379), including availability of inspector certification extensions under declared emergency situations adopted in response to the COVID-19 National emergency. Specific changes are addressed in connection with CVSA's comment to the proposed rulemaking and subsequent updates in Section V, below.

In the NPRM, FMCSA proposed to replace an IFR titled "Certification of Safety Auditors, Safety Investigators, and Safety Inspectors," published March 19, 2002 (67 FR 12776), in part, by formally incorporating by reference the FMCSA certification policy in its regulations. For the reasons discussed in the following paragraph, FMCSA takes a different procedural approach in this final rule and does not incorporate the FMCSA certification policy. Accordingly, FMCSA now replaces the IFR by amending some of its provisions and republishing other provisions without change.

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<sup>1</sup> FMCSA uses the term "driver or vehicle inspection" in lieu of the term "roadside inspection," recognizing that these inspections are not necessarily conducted at "roadside."

FMCSA initially proposed incorporating its own certification policy because CVSA's policy has been included as an attachment within that policy. However, as discussed in detail below, since this rulemaking began, CVSA has revised its policy three times. The frequent revisions have prompted FMCSA to determine that it will be administratively easier for the Agency to respond to future revisions of the CVSA policy if it is not included as an attachment in the FMCSA certification policy. Also, the approach of incorporating by reference in FMCSA's regulations only the CVSA policy is simpler and less confusing. As of the effective date of this rule, FMCSA will remove the CVSA policy as an attachment to FMCSA's certification policy. Therefore, it is no longer necessary to incorporate FMCSA's certification policy. While minor changes will be made in FMCSA's certification policy to conform cross references to the CVSA policy, no substantive changes will be made to FMCSA's policy or the certification requirements. FMCSA's policy addresses certification requirements to conduct safety audits and investigations, and supplements the provisions of CVSA's policy, particularly as applicable to FMCSA employees.

The certification policy applies only to FMCSA employees and contractors and State or local government employees and contractors funded through FMCSA's Motor Carrier Safety Assistance Program (MCSAP) who wish to obtain or maintain certification to conduct driver or vehicle inspections, safety audits, or investigations. This rule does not change any regulatory requirements applicable to motor carriers, drivers, or commercial motor vehicles (CMV). As such, there is no impact on motor carriers or drivers.

*B. Costs and Benefits*

There are neither costs nor benefits associated with this rule.

**III. Legal Basis for the Rulemaking**

FMCSA's authority for this rule is from two statutes, section 211 of the Motor

Carrier Safety Improvement Act of 1999 (MCSIA),<sup>2</sup> and section 5205 of the FAST Act.<sup>3</sup>

Section 211 of the MCSIA requires the Secretary of Transportation to issue regulations “to improve training and provide for the certification of motor carrier safety auditors ... to conduct safety inspection audits and reviews” under specified statutory provisions (49 U.S.C. 31148(a)). Subject to a grandfathering provision applicable to Federal and State employees who were qualified to conduct a safety inspection audit or review on December 9, 1999, the statute requires that covered safety inspection audits or reviews be conducted by individuals certified under the regulations (49 U.S.C. 31148(b)). While private contractors are authorized to obtain certification, the Secretary is not permitted to delegate authority to private contractors to issue ratings or operating authority (49 U.S.C. 31148(a) and (d)). Finally, the statute grants the Secretary authority over certified safety auditors, including the authority to withdraw their certification (49 U.S.C. 31148(e)). On March 19, 2002, FMCSA issued an IFR implementing this statutory provision (67 FR 12776).

Section 5205 of the FAST Act requires FMCSA’s Administrator to revise 49 CFR part 385 “to incorporate by reference the certification standards for roadside inspectors issued by the Commercial Vehicle Safety Alliance” (note following 49 U.S.C. 31148).

The Administrative Procedure Act (APA) specifically provides exceptions to its notice and comment rulemaking procedures when an agency finds there is good cause to dispense with them, and incorporates the finding and a brief statement of the reasons for such action in the rules issued (5 U.S.C. 553(b)(3)(B)). Good cause exists when an agency determines that notice and public comment procedures are impractical, unnecessary, or contrary to the public interest. The APA also allows agencies to make

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<sup>2</sup> Pub. L. 106–159, 113 Stat. 1748, 1765–66 (Dec. 9, 1999), codified at 49 U.S.C. 31148.

<sup>3</sup> Pub. L. 114–94, 129 Stat. 1312, 1537 (Dec. 4, 2015), note following 49 U.S.C. 31148.

rules effective immediately with good cause (5 U.S.C. 553(d)(3)), instead of requiring publication 30 days prior to the effective date.

During the comment period, CVSA informed FMCSA that its “Operational Policy 4: Inspector Training and Certification” was revised on April 4, 2019, and encouraged FMCSA to incorporate the then-current revision, rather than the version dated September 21, 2017 referenced in the proposed rule. After the comment period, FMCSA learned from CVSA that its policy was further revised on March 30, 2020, in response to the COVID-19 National emergency, and revised again on April 29, 2021.

The changes made in the April 4, 2019 revision are largely minor or administrative in nature. However, in addition to minor changes of a similar nature, the March 30, 2020 revision makes changes needed to give jurisdictions the ability to extend time periods under declared emergencies when, as in the current unprecedented and unexpected COVID-19 National emergency, individuals are prevented from completing training or performing the required number of inspections necessary to obtain or maintain certification. The changes made in the April 29, 2021 revision are again minor. Specific changes made in each revision are addressed in Section V, below.

During the COVID-19 National emergency, many individuals have not been able to complete inspections necessary to obtain or maintain certification because the majority of inspection facilities have not been open or have been open only sporadically. In addition, until recently, the Agency has observed maximum telework, so inspectors were generally not permitted to go to inspection facilities. In facilities where inspections were being performed, staffing levels were reduced and rotated to meet social distancing guidelines. Because of these limitations, some individuals have not been able to complete the number of inspections in the applicable time periods to satisfy the requirements to obtain or maintain certification, which could result in job loss. Without an extension to complete the certification requirements, such individuals would have to start the

certification process over by repeating course work or challenging the examination and performing 32 inspections, which would reduce the number of inspectors available to perform inspections. The potential shortage of certified inspectors could have an adverse impact on CMV safety.

The COVID-19 National emergency is outside the Agency's control and its widespread impact could not be foreseen. Accordingly, the public interest is best served by adopting the most recent version of "Operational Policy 4: Inspector Training and Certification" immediately without further public comment or a delayed effective date, to ensure there is an adequate number of certified individuals available to perform inspections as the COVID-19 National emergency abates and to ensure CMV safety is not compromised. Moreover, given that the FAST Act requires the FMCSA Administrator to incorporate by reference CVSA's certification standards, the Agency is performing nondiscretionary, ministerial acts in accommodating CVSA's changes. The changes to the CVSA policy also do not impose any material new requirements or increase compliance obligations. Finally, a delayed effective date is unnecessary because this rule incorporates the most recent version of CVSA's policy that is already in effect. For these reasons, FMCSA finds good cause that further notice and public comment on this final rule are unnecessary and impracticable, and finds good cause for this rule to be effective immediately.

This rule replaces the 2002 IFR issued under section 211 of the MCSIA and carries out section 5205 of the FAST Act.

#### **IV. Discussion of Proposed Rulemaking**

FMCSA published an NPRM on July 8, 2019 (84 FR 32379). In that NPRM, FMCSA proposed to replace the 2002 IFR by incorporating by reference FMCSA's "Certification Policy for Employees Who Perform Inspections, Investigations, and Safety Audits." The NPRM also proposed to incorporate by reference the September 21, 2017

version of CVSA’s “Operational Policy 4: Inspector Training and Certification,” which, at the time, was Attachment A of FMCSA’s policy. Finally, FMCSA proposed to republish the definition of the term *safety audit* as it was published in the 2002 IFR to allow comment on the definition.

## **V. Public Comments**

### *A. Comments to the Proposed Rulemaking; Subsequent Updates*

Only one timely comment, from CVSA, was received in response to the NPRM. CVSA commended FMCSA for proposing to incorporate by reference CVSA’s “Operational Policy 4: Inspector Training and Certification” because it provides a uniform standard for training and certifying inspectors to ensure they have the knowledge needed to conduct effective driver or vehicle inspections. However, CVSA noted that its “Operational Policy 4: Inspector Training and Certification” was revised on April 4, 2019 and encouraged FMCSA to incorporate the then-current revision rather than the version dated September 21, 2017 referenced in the proposed rule.

Subsequent to the comment period, FMCSA learned from CVSA that “Operational Policy 4: Inspector Training and Certification” was further revised on March 30, 2020, in response to the COVID-19 National emergency to address jurisdictions’ ability to extend inspectors’ certifications under certain declared emergencies, and revised again on April 29, 2021. These revisions are discussed further below.

### *B. Agency Response*

Consistent with the intent of section 5205 of the FAST Act,<sup>4</sup> the comment submitted by CVSA, and current certification processes, including availability of emergency extensions, FMCSA incorporates in its regulations the latest revision of CVSA’s “Operational Policy 4: Inspector Training and certification,” revised April 29,

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<sup>4</sup> Pub. L. 114–94, 129 Stat. 1312, 1537 (Dec. 4, 2015), note following 49 U.S.C. 31148.

2021 (including the April 4, 2019, March 30, 2020, and April 29, 2021 amendments).

This revision is available at <https://www.fmcsa.dot.gov/certification>.<sup>5</sup>

FMCSA has compared the April 4, 2019 revisions to “Operational Policy 4: Inspector Training and Certification”<sup>6</sup> and the version cited in the July 8, 2019 NPRM and determined that the changes are largely minor or administrative. On page 1 of the April 4, 2019 revision, under the heading “General,” a new paragraph is added at the end providing that an individual or agency seeking training approval must contact the appropriate jurisdiction’s representative responsible for training coordination. If the jurisdiction’s representative receives a request from outside the jurisdiction, the representative must ensure that the requester’s jurisdictional representative for training coordination has granted permission. The purpose of the addition is to ensure that agencies go through a jurisdiction’s MCSAP lead-agency, given that training is generally funded through MCSAP funds.

On page 6, under the prerequisites for “Other Bulk Packaging Inspection Certificate,” the need for a North American Standard Cargo Tank Inspection certificate is eliminated. The CVSA hazardous materials and training committees recognized that the background for the two types of inspections is significantly different and that there is no need to be certified for cargo tank inspections to do other bulk packaging inspections and vice-versa. The required training for the two certifications is now distinct, but it does not create new training requirements.

In addition to minor changes of a similar nature, the March 30, 2020 revision<sup>7</sup> makes changes needed to give jurisdictions the ability to extend time periods under

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<sup>5</sup> This document is also available at the locations referenced in 49 CFR 385.4, as adopted in this rule, and in the docket for this rulemaking.

<sup>6</sup> This document is available in the docket for this rulemaking, <https://www.regulations.gov/document?D=FMCSA-2019-0081-0006>.

<sup>7</sup> This document is available in the docket for this rulemaking, <https://www.regulations.gov/document?D=FMCSA-2019-0081-0009> and <https://www.regulations.gov/document?D=FMCSA-2019-0081-0008>.

declared emergencies when individuals are prevented from completing training or performing the required number of inspections necessary to obtain or maintain certification. Specifically, on page 2 of the March 30, 2020 revision, language is added, defining *Declared Emergency* as “[a]n emergency situation that has been declared by a federal, state, provincial, territorial or local government authority that removes an inspector from the responsibility or ability to conduct inspections. This includes, but is not limited to fire, flood, drought, pestilence, famine, disease, hurricanes, tornadoes, etc.” On page 8, the March 30, 2020 revision addresses initial certifications, providing that, in the case of a declared emergency, if an inspector is unable to conduct the inspections within the required 6-month time frame, the applicable lead agency may provide the inspector an extension not exceeding 6 months. However, if the declared emergency lasts beyond the 6-month extension, an inspector must attend applicable courses, pass required exams, and complete required inspections. The applicable jurisdiction is responsible for ensuring proficiency once initial inspections are completed.

Under the Standards for Inspector Decertification/Dequalification, on page 14 of the March 30, 2020 revision, a provision is added addressing declared emergencies affecting an inspector’s ability to maintain any certification other than Level VI (Transuranic Waste and Highway Route Controlled Qualities (HRCQ) of Radioactive Material) and Performance-Based Brake Tester Qualification. If an inspector cannot complete the required inspections during a 3-month extension period available under the policy, the March 30, 2020 revision allows the lead agency to grant a further extension lasting no more than 3 months beyond the end of the declared emergency. Finally, on page 10, the March 30, 2020 revision addresses similar extensions in cases of declared emergencies for those with Level VI certifications and qualification as a performance-based brake tester.

The April 29, 2021 revision makes changes needed to give all trainee inspectors a full 6 months to complete the applicable number of required inspections. Specifically, on pages 2 (Level I Certification), 3 (Level II and III Certification), and 4 (Level V Certification), the prior version provided inspections are to be completed no later than 6 months after passing the required written exam or exams, as applicable. The revision removes the word “written” because not all exams are written and adds a sentence. It reads: “Agencies that have additional classroom training elements immediately following the exam may have the six-month time frame begin after all the classroom training is completed.” Some programs have classroom training that continues several weeks after the required formal exam(s), during which time inspections cannot be performed. The April 29, 2021 revision addresses these situations and ensures trainee inspectors are not disadvantaged if a program provides classroom training after the exam(s) are completed.

At the end of the section labeled “Level II Certification” on page 3, the April 29, 2021 revision adds a paragraph that provides successful completion of Level II certification training also qualifies an inspector to receive a Certificate of Proficiency to conduct Level III inspections and, if the inspection includes a specific component identified in the Level II Inspection Procedure, Level IV inspections. This clarifies that successful completion of Level II certification includes certification to conduct Level III or certain focused inspections. Similarly, at the end of the section labeled “Level III Certification” on page 4, the April 29, 2021 revision adds language that provides successful completion of Level III certification training also qualifies an inspector to receive a Certificate of Proficiency to conduct Level IV inspections if the inspection includes a specific component identified in the Level III Inspection Procedure. Finally, at the end of the section labeled “Level V Certification” on page 4, the April 29, 2021 revision adds language that provides successful completion of Level V certification training also qualifies an inspector to receive a Certificate of Proficiency to conduct

Level IV inspections if the inspection includes a specific component identified in the Level V Inspection Procedure.

Other changes are simply technical or administrative measures.<sup>8</sup>

## **VI. Incorporation by Reference**

In accordance with section 5205 of the FAST Act (note following 49 U.S.C. 31148), FMCSA incorporates by reference in its regulations CVSA's "Operational Policy 4: Inspector Training and Certification," revised April 29, 2021. This rule amends 49 CFR 385.4, Matter incorporated by reference, to include CVSA's policy on the list of materials incorporated and to identify the specific section that relies upon the material. The policy is referenced in § 385.207.

The CVSA policy ensures that CMV inspectors uploading driver or vehicle inspection reports and data into FMCSA information systems are certified under a training program that is approved by CVSA. The policy provides the standards for initial inspector certification and maintenance of inspector certification. It also provides the decertification process and paths to regain certification.

The CVSA policy provides the minimum training and testing requirements and number of inspections an individual must complete to be certified to conduct the following types of driver or vehicle inspections:

- North American Standard Level I, II, III, and V Inspections;
- Hazardous Materials/Dangerous Goods Inspection;
- Cargo Tank Inspection;

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<sup>8</sup> For example, on page 3 of the April 4, 2019 revision, under Level II certification, a change is made to reflect that either Level I or Level II inspections may count toward the 32-inspection minimum. Throughout the notes included under each certification standard, the appropriate certification description is inserted in describing the type of inspections not permitted absent certification (in lieu of references to Level I inspection in the 2017 policy); this appears to correct a typographical error. On page 1 of that revised policy, under the heading "General," the word "Inspection" is inserted after the term "Hazardous Materials/Dangerous Goods." On page 4 of the March 30, 2020 revision, a missing word was inserted and references to the availability of refresher training were inserted in appropriate locations.

- Other Bulk Packaging Inspection;
- Passenger Carrier Vehicle Inspection;
- North American Standard Level VI Inspection for Transuranic Waste and Highway Route Controlled Quantities (HRCQ) of Radioactive Material; and
- Performance-Based Brake Testing.

CVSA’s “Operational Policy 4: Inspector Training and Certification” is available in the docket for this rulemaking. Additionally, the material is available, and will continue to be available, for inspection at the FMCSA, Office of Enforcement and Compliance, 1200 New Jersey Avenue SE, Washington, DC 20590 (Attention: Chief, Compliance Division) at (202) 366-1812, and online at <https://www.fmcsa.dot.gov/certification>.

## **VII. Section-by-Section Analysis**

This section-by-section analysis describes changes from the proposed rule in numerical order. With respect to subpart C of part 385, changes from the existing regulatory text also are explained.

### *A. Section 385.3 Definitions and Acronyms*

This section is adopted as proposed in the July 8, 2019 NPRM. As stated in the NPRM, FMCSA republishes the definition of *safety audit* in paragraph (2) of the definition of *reviews* without change as a procedural necessity to replace the 2002 IFR.

### *B. Section 385.4 Matter Incorporated by Reference*

Many changes proposed to § 385.4 in the NPRM are no longer necessary. For example, most of the proposed changes to paragraph (a) to update the locations where incorporated materials can be obtained are no longer necessary because the updates were made in different rules (84 FR 32323, 32326 (July 8, 2019); 85 FR 10307, 10310 (Feb. 24, 2020)). The exception is that FMCSA amends paragraph (a) to provide a new email address ([fr.inspection@nara.gov](mailto:fr.inspection@nara.gov)) for the National Archives and Records

Administration. Because FMCSA takes the simpler approach in this final rule of incorporating by reference only CVSA's policy, proposed paragraph (c) to incorporate FMCSA's policy is no longer necessary. Because it is no longer helpful to restate the entire section for clarity, the restatement of paragraph (b)(1) pertaining to other CVSA materials incorporated by reference, which are unrelated to this rule, is unnecessary.

In this final rule, FMCSA amends the paragraph (b) introduction by adding the acronym "CVSA." The Agency revises proposed paragraph (b)(2) to reference the CVSA "Operational Policy 4: Inspector Training and Certification" April 29, 2021 revision of the policy (including the April 4, 2019, March 30, 2020, and April 29, 2021 amendments), consistent with the requirements of the FAST Act and current certification processes. FMCSA adds the term "CVSA Operational Policy 4" to make the related sections more concise. FMCSA deletes the proposed reference to the CVSA policy being available as attachment A of the FMCSA certification policy and changes proposed "§ 385.209" to "§ 385.207," to reflect the final rule section designation.

*C. Subpart C—Certification of Safety Auditors, Safety Investigators, and Safety Inspectors*

The NPRM proposed to remove and reserve §§ 385.201, 385.203, and 385.205 and add new §§ 385.207, 385.209, and 385.211 to accomplish the incorporation of both the CVSA and FMCSA policies. Because FMCSA takes the simpler approach in this final rule of incorporating by reference only CVSA's policy, FMCSA essentially needs only to amend the existing sections by removing references to inspections and adding a new § 385.207 to address inspections. Accordingly, there is no need to amend the subpart heading.

However, since the existing regulations are nearly 20 years old, the Agency adopts most of the terminology and other updates or changes proposed in the NPRM. For example, FMCSA adopts the current language for describing driver or vehicle

inspections. The word “individual” replaces “person” and certain referenced pronouns. When employees are referenced, FMCSA includes contractors as proposed. The Agency adopts the updated physical and website addresses for this part as proposed in § 385.4. FMCSA removes the unnecessary acronym “MCSAP” also as proposed.

FMCSA continues to update the June 17, 2002 date used for the grandfather provisions. However, the NPRM was prepared under the assumption that the final rule would be effective 60 days after it was published. As discussed above in Section III, the Agency finds good cause to make this rule effective immediately. Accordingly, the referenced date is changed to reflect the date the final rule is published in the *Federal Register*, rather than 60 days following publication of the rule.

**Section 385.201 Who is qualified to perform a safety audit or investigation, including review, of a motor carrier or an intermodal equipment provider?**

In addition to adopting use of contractor and individual, eliminating use of MCSAP, and updating the date of the grandfather clause, FMCSA amends § 385.201 as follows. The Agency changes the section heading by adding the phrase “safety audit or investigation, including” before “review” and adding a comma after it to identify the new scope of the section. FMCSA removes the terms “compliance review” and “roadability review” and replaces them with the phrase “safety audit or investigation” essentially as proposed, but adds “, including review,” after investigation to clarify an individual certified to perform an investigation is also certified to conduct a “review,” as defined in § 385.3 to include compliance and roadability reviews. FMCSA also removes the references to roadside inspections.

**Section 385.203 What are the requirements to obtain and maintain certification to perform a safety audit or investigation, including review?**

In addition to adopting use of the term “individual” (including replacing the word “employees”), updating the date of the grandfather clause, and updating physical and

website addresses, FMCSA amends § 385.201 as follows. The Agency changes the section heading by adding the phrase “to perform a safety audit or investigation, including review” to identify the scope of the section. FMCSA removes the terms “compliance review” and “roadability review” and replaces them with the phrase “safety audit or investigation” essentially as proposed, but again adds “, including review,” after investigation for clarification. FMCSA also removes the references to roadside inspections. Finally, in paragraph (b), FMCSA removes the paragraph heading to conform to the part style of not including such headings and “the” before FMCSA in the second sentence.

**Section 385.205 How can an individual who has lost certification to perform a safety audit or investigation, including review, be re-certified?**

In addition to adopting use of the term “individual” and eliminating certain referenced pronouns, FMCSA amends § 385.201 by adding in the section heading the phrase “to perform a safety audit or investigation, including review” after certification to identify the scope of the section.

**Section 385.207 What are the requirements to obtain and maintain certification to conduct driver or vehicle inspections?**

FMCSA adds a new § 385.207 to address certification to conduct driver or vehicle inspections as set forth in CVSA’s Operational Policy 4. The Agency adopts this section essentially as proposed in the NPRM as §§ 385.207(b) and 385.209, except for substituting “CVSA” and “Operational Policy 4” where applicable to be more concise. FMCSA changes the section heading of proposed § 385.209 by adding “What are the” at the beginning to form a question consistent with the existing section headings. The specifics of the grandfather provision in paragraph (a) were proposed § 385.207(b). The remainder of paragraph (a) was proposed § 385.209(a). Paragraph (b) was proposed

§ 385.209(b). FMCSA removes the proposed paragraph headings to conform to the part style of not including such headings.

## **VIII. Regulatory Analyses**

### *A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures*

FMCSA has considered the impacts of this rule under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and DOT's regulatory policies and procedures. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) has determined that this rulemaking is not a significant regulatory action under section 3(f) of E.O. 12866. Accordingly, OMB has not reviewed it under that E.O.

As addressed under Section V, above, the revisions to CVSA's "Operational Policy 4: Inspector Training and Certification" are either largely minor or administrative or do not impose any material requirements or increase compliance obligations. Accordingly, there are no new costs or benefits associated with this final rule.

### *B. Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).<sup>9</sup>

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<sup>9</sup> A "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs at OMB finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major increase in costs or prices for consumers, individual industries, Federal agencies, State agencies, local government agencies, or geographic regions; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (5 U.S.C. 804(2)).

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,<sup>10</sup> requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

This rule directly affects States and a limited number of contractors requiring certification. States do not meet the definition of a “small entity” in section 601 of the Regulatory Flexibility Act. Specifically, States are not considered small governmental jurisdictions under section 601(5), both because State government is not included among the various levels of government listed in section 601(5), and because no State, including the District of Columbia, has a population of less than 50,000, which is the criterion for a governmental jurisdiction to be considered small under section 601(5). As the rule will not result in costs or benefits, it will not impose impacts on the limited number of contractors regulated under this rule. Therefore, this rule will not have an impact on a substantial number of small entities. Because FMCSA incorporates by reference the current policy and practices for individuals to obtain and maintain certification for conducting inspections, this rule will not result in changes for those affected. Thus, this rule will not have a significant economic impact on the regulated entities.

Consequently, I certify that the action will not have a significant economic impact on a substantial number of small entities.

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<sup>10</sup> Pub. L. 104–121, 110 Stat. 857 (Mar. 29, 1996), note following 5 U.S.C. 601.

*D. Assistance for Small Entities*

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance; please consult the person listed under FOR FURTHER INFORMATION CONTACT.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

*E. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$170 million (which is the value equivalent of \$100 million in 1995, adjusted for inflation to 2020 levels) or more in any 1 year. Though this rule will not result in such an expenditure, the Agency does discuss the effects of this rule elsewhere in this preamble.

*F. Paperwork Reduction Act*

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

*G. E.O. 13132 (Federalism)*

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” FMCSA has determined that this rule will not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

*H. Privacy*

The Consolidated Appropriations Act, 2005,<sup>11</sup> requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that will affect the privacy of individuals. This rule will not require the collection of personally identifiable information.

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency that receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002,<sup>12</sup> requires Federal agencies to conduct a PIA for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology would

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<sup>11</sup> Pub. L. 108–447, 118 Stat. 2809, 3268 (Dec. 4, 2014), note following 5 U.S.C. 552a.

<sup>12</sup> Pub. L. 107–347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002).

collect, maintain, or disseminate information as a result of this rule. Accordingly, FMCSA has not conducted a PIA.

*I. E.O. 13175 (Indian Tribal Governments)*

This rule does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

*J. National Environmental Policy Act of 1969*

FMCSA analyzed this rulemaking for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680, Mar. 1, 2004), Appendix 2, paragraph 6.d. The categorical exclusion in paragraph 6.d. covers regulations concerning the training, qualifying, licensing, certifying, and managing of personnel. The requirements in this rule are covered by this categorical exclusion and the rule will not have any effect on the quality of the environment.

**List of Subjects in 49 CFR Part 385**

Administrative practice and procedure, Highway safety, Incorporation by reference, Mexico, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, FMCSA amends 49 CFR chapter III, part 385, to read as follows:

**PART 385—SAFETY FITNESS PROCEDURES**

1. The authority citation for part 385 is revised to read as follows:

**Authority:** 49 U.S.C. 113, 504, 521(b), 5105(d), 5109, 5113, 13901-13905, 13908, 31135, 31136, 31144, 31148, 31151, 31502; sec. 113(a), Pub. L. 103-311, 108 Stat. 1673, 1676; sec. 408, Pub. L. 104-88, 109 Stat. 803, 958; sec. 350, Pub. L. 107-87, 115 Stat. 833, 864; sec. 5205, Pub. L. 114-94, 129 Stat. 1312, 1537; and 49 CFR 1.87.

2. In § 385.3, republish paragraph (2) of the definition of *Reviews* to read as follows:

**§ 385.3 Definitions and acronyms.**

\* \* \* \* \*

*Reviews.* \* \* \*

(2) *Safety audit* means an examination of a motor carrier's operations to provide educational and technical assistance on safety and the operational requirements of the FMCSRs and applicable HMRs and to gather critical safety data needed to make an assessment of the carrier's safety performance and basic safety management controls. Safety audits do not result in safety ratings.

\* \* \* \* \*

3. Amend § 385.4 as follows:

a. In paragraph (a), remove the text “[fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov)” and add, in its place, the text “[fr.inspection@nara.gov](mailto:fr.inspection@nara.gov)”;

b. Revise paragraph (b) introductory text; and

c. Add paragraph (b)(2).

The revision and addition read as follows:

**§ 385.4 Matter incorporated by reference.**

\* \* \* \* \*

(b) Commercial Vehicle Safety Alliance (CVSA), 6303 Ivy Lane, Suite 310, Greenbelt, MD 20770, telephone (301) 830-6143, [www.cvsa.org](http://www.cvsa.org).

\* \* \* \* \*

(2) “Operational Policy 4: Inspector Training and Certification”, Revised April 29, 2021 (CVSA Operational Policy 4); incorporation by reference approved for § 385.207. (Also available at [www.fmcsa.dot.gov/certification](http://www.fmcsa.dot.gov/certification)).

4. Revise § 385.201 to read as follows:

**§ 385.201 Who is qualified to perform a safety audit or investigation, including review, of a motor carrier or an intermodal equipment provider?**

(a) An FMCSA employee or contractor, or a State or local government employee or contractor funded through the Motor Carrier Safety Assistance Program, who was qualified to perform a safety audit or investigation, including review, before [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], may perform a safety audit or investigation, including review, if the individual complies with § 385.203(b).

(b) An individual who was not qualified to perform a safety audit or investigation, including review, before [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], may perform a safety audit or investigation, including review, after complying with the requirements of § 385.203(a).

5. Revise § 385.203 to read as follows:

**§ 385.203 What are the requirements to obtain and maintain certification to perform a safety audit or investigation, including review?**

(a) On and after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], an individual who is not qualified under § 385.201(a) may not perform a safety audit or investigation, including review, unless the individual has been certified by FMCSA or a State or local agency applying the FMCSA standards after successfully completing classroom training and examinations on the FMCSRs and HMRs as described in detail on the FMCSA website ([www.fmcsa.dot.gov/certification](http://www.fmcsa.dot.gov/certification)). These individuals must also comply with the maintenance of certification/qualification requirements of paragraph (b) of this section.

(b) An individual may not perform a safety audit or investigation, including review, unless the individual meets the quality-control and periodic re-training requirements adopted by FMCSA to ensure the maintenance of high standards and familiarity with amendments to the FMCSRs and HMRS. These maintenance of certification/qualification requirements are described in detail on the FMCSA website ([www.fmcsa.dot.gov/certification](http://www.fmcsa.dot.gov/certification)).

(c) The requirements of paragraphs (a) and (b) of this section for training, performance, and maintenance of certification/qualification, which are described on the FMCSA website ([www.fmcsa.dot.gov/certification](http://www.fmcsa.dot.gov/certification)), are also available in hard copy from the Federal Motor Carrier Safety Administration, Office of Enforcement and Compliance, 1200 New Jersey Ave. SE, Washington, DC 20590; Attention: Chief, Compliance Division at (202) 366-1812.

6. Revise § 385.205 to read as follows:

**§ 385.205 How can an individual who has lost certification to perform a safety audit or investigation, including review, be re-certified?**

The individual must successfully complete the requirements of §385.203(a) and (b).

7. Add § 385.207 to read as follows:

**§ 385.207 What are the requirements to obtain and maintain certification to conduct driver or vehicle inspections?**

(a) An FMCSA employee or contractor, or a State or local government employee or contractor funded through the Motor Carrier Safety Assistance Program, who was qualified to conduct a driver or vehicle inspection before [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] or meets requirements as specified in CVSA Operational Policy 4 (incorporated by reference, see § 385.4) may conduct a

driver or vehicle inspection. The individual may conduct a driver or vehicle inspection only at a level for which the individual is certified.

(b) An individual who qualifies to conduct driver or vehicle inspections under this section must meet the requirements for maintaining certification or obtaining recertification as specified in CVSA Operational Policy 4.

Issued under authority delegated in 49 CFR 1.87.

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Meera Joshi,  
Deputy Administrator.

[FR Doc. 2021-18474 Filed: 8/26/2021 8:45 am; Publication Date: 8/27/2021]